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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 368

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

ROBERT F. RUDDY and ATLAS TACK CORPORATION,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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THE REPORTER COMPANY, INC., Walton, N. Y.—1954

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, New York Central Railroad Company (hereinafter called the "Railroad Company") respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this cause on June 24, 1955.

Opinions Below.

The opinion of the United States District Court for the Northern District of New York (Foley, J.) (R. Vol. I,

130a-140a), was reported at 124 Fed. Supp. 470. The prevailing opinion of the Court of Appeals for the Second Circuit (Hand, J., concurred in by Frank, J.) and the minority opinion in that court dissenting in part (Swan, J.) (*infra*, pp. 1a-8a) are not yet reported.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed was dated and entered on June 24, 1955 (453a-454a)*, and a copy thereof is appended to this petition in the Appendix at pages 9a-10a. There were no orders respecting a rehearing or granting an extension of time within which to petition for certiorari. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Question Presented.

This action was brought by the plaintiff, an employee of the Railroad Company, pursuant to the Federal Employers' Liability Act (45 U. S. C. 51-60), to recover for personal injuries sustained by him while engaged in the performance of his duties as a brakeman. The accident happened on a private sidetrack of the third-party defendant Atlas Tack Corporation (hereinafter called the "Industry"). The plaintiff, at the time of the accident, was riding on the lead end of a freight car which was being pushed by a Diesel engine. The front trucks of the car derailed with the result that the plaintiff was pinned between the car and an adjoining building. The Court charged the doctrine of *res ipsa loquitur* with respect to the derailment, to which the Railroad Company objected. The question presented is whether this doctrine

* References in parentheses hereinafter made are to pages of Volume II of the Record (appendix of the Railroad Company in the Court of Appeals) unless otherwise indicated.

applies to a derailment, such as was here involved, which happened on the private sidetrack of the Industry.

Statutes Involved.

The pertinent portions of the Federal Employers' Liability Act (45 U. S. C. 51-60) are set forth in the Appendix at page 11a.

Statement of the Case.

The sidetrack on which this accident happened stemmed from the main line of the Adirondack Division of the Railroad Company at Herkimer, New York and ran in a generally northerly and southerly direction (242a, 251a). At a point some distance southerly of the plant which it served, the sidetrack proceeded on to the property of the Industry, and thereafter, proceeding northerly, it passed between two buildings, the one on the right or east being referred to as the storehouse building and that on the left or west being referred to as the machine room (247a, 248a, 250a). In its passage between the two buildings the track curved slightly to the west or left and, commencing at the southwest corner of the storehouse building, the clearance between the easterly rail of the sidetrack and the foundation of the building, over a distance of 66½ feet, varied from a maximum of 4.75 feet to a minimum of 4.50 feet (258a, 259a). The overhang of the car involved was approximately three feet so that, with the car on the track, the actual clearance between the car and the foundation of the storehouse building would have varied from a maximum of approximately 1.75 feet to a minimum of approximately 1.50 feet (259a). Narrow as was the intervening space, there

was enough clearance for a brakeman to ride on the side of a car, and the brakemen sometimes did so (161a, 178a, 179a, 315a, 316a).

The freight car was being pushed in a northerly direction and the plaintiff was riding on the side ladder on the right front or northeast end of the car (218a). At a point 15½ feet southerly of the storehouse building the north or front trucks of the car derailed toward the east and at about the same time, due to the curve in the tracks, the plaintiff passed out of the view of the engineer (217a, 218a, 255a, 296a, 298a). The derailment was not discovered by any member of the crew until after the train was brought to a stop, with the north end of the car approximately 66½ feet northerly of the southwest corner of the storehouse building, and the plaintiff was then found on the ground between the car and the building (190a, 254a, 255a, 323a, 324a, 332a, 333a). By reason of the derailment there was a deviation of the car to the east ranging from approximately one foot at the southwest corner of the storehouse building to 1.68 feet at the point where the car was brought to a stop, thus causing a corresponding reduction in the actual clearance between the car and the building (255a).

The sidetrack over which the train was being operated was on the premises of the Industry. The agreement, pursuant to which the sidetrack was operated,* provided that the Industry should provide the necessary right of way and "procure and maintain in effect all grants, licenses, franchises or permits necessary for the construction, maintenance, operation or removal of the track * * *" (Par. First (a), Exhibit B). The agreement further provided that the Industry should maintain the track and should keep it clear of ice, snow and refuse

* A copy of the sidetrack agreement (Exhibit B), exclusive of the blueprint therein referred to, is appended to this petition in the appendix at pages 12a-19a.

for a distance of six feet outside the rails (Par. First [c] and [g], Exhibit B). The car involved, following the accident, was found to be in perfect condition, except for damage to the ladder on which the plaintiff was riding, which apparently had been caused from contact with a vent pipe or with the foundation of the storehouse building (375a-383a, 377a, 378a). As above indicated, the Court charged the doctrine of *res ipsa loquitur* with respect to the derailment to which the Railroad Company objected (428a, 429a, 432a).

The basis for federal jusisdiction in the court of first instance is 45 U. S. C. 56.

Reasons for Allowance of Writ.

The Railroad Company contends that the writ should be allowed for the following reasons:

(1) The decision of the Court of Appeals is in conflict with a decision of this Court; or

(2) The decision of the Court of Appeals involves an important question of Federal Law which has not been but should be settled by this Court.

The doctrine of *res ipsa loquitur* is predicated upon exclusive management and control by a party defendant of the instrumentalities involved in the accident upon which suit is brought. The instrumentalities here involved included not merely the train, as to which defendant concededly was in control, but also the private sidetrack of the Industry (*Jesionowski v. Boston & Maine Railroad*, 329 W. S. 452). The Court of Appeals, in sustaining the judgment for the plaintiff, determined that there was the requisite exclusive management and control of the sidetrack merely by reason of the fact that, under the terms of the sidetrack agreement, the Railroad Com-

pany "had reserved the right to discontinue the service, if the Atlas Company should fail to keep the track clear * * *" (*infra*, p. 4a).

It is believed that the decision of the Court of Appeals is contrary to the decision of this Court in *Atlantic Coast Line R. Co. v. Temple*, 285 U. S. 143. That action was brought, pursuant to the Federal Employers' Liability Act, by the administratrix of a locomotive engineer who was killed as the result of a derailment. The derailment occurred on the lines of another railroad company over which the defendant railroad company did not have exclusive control and, while the doctrine of *res ipsa loquitur* was not discussed, it was impliedly involved in the holding of the Court that the derailment, in and of itself, was not a sufficient basis for a finding of negligence on the part of the defendant. This was the construction placed upon the decision by the Circuit Court of Appeals for the Sixth Circuit in *Lowery v. Hocking Valley Ry. Co.*, 60 F. 2d 78.

Except as to the case above mentioned, research has failed to disclose any case in this Court involving the question now presented. This question, it is submitted, is an important federal question which should be settled by this Court. It is of importance to the railroad industry generally since it will be presented in every action brought under the Federal Employers' Liability Act involving a derailment on a private sidetrack. It is of importance to every industry served by a sidetrack since, just as in the case now being considered, under indemnity clauses customarily included in sidetrack agreements, the industry, under certain circumstances, may eventually be called upon to pay for any recovery by a railroad employee. But more than this, the decision of the Court of Appeals represents such a startling extension of the doctrine of *res ipsa loquitur* as to call for the exercise of the supervisory powers of this Court.

CONCLUSION.

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, August 18, 1955.

Respectfully submitted,

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APPENDIX.

Opinion of Court Below.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 318. October Term, 1954.

Argued May 9, 1955. Decided June 24, 1955.

Docket No. 23505.

ROBERT F. RUDDY,
Appellee,

v.

NEW YORK CENTRAL RAILROAD COMPANY,
Appellant.

NEW YORK CENTRAL RAILROAD COMPANY,
Appellee,

v.

ATLAS TACK CORPORATION,
Appellant.

Before: HAND, SWAN and FRANK, Circuit Judges.

The New York Central Company appeals from a judgment against it of the District Court for the Northern District of New York—Foley, J., presiding—in an action by an employee to recover for personal injuries under the Federal Employers' Liability Act. The Atlas Corporation appeals from a judgment against it on a "third-

party claim," brought by the New York Central Railroad Company upon an agreement to indemnify the railroad for liability in the employee's action.

George Gordon Mahley, for Ruddy.
Willis D. Morgan, for the Railroad.
George S. Sullivan, for the Atlas Tack Corporation.

HAND, Circuit Judge:

The defendant railroad appeals from a judgment in favor of an employee, the plaintiff, under the Federal Employers' Liability Act after a trial to a jury. The Atlas Tack Corporation appeals from a judgment in favor of the railroad upon a "third-party" claim, brought by the railroad against it upon a contract of indemnity for any judgment rendered against the railroad because of an encroachment upon the railroad's right of way of the wall of one of the Atlas Company's buildings. The railroad's appeal is based upon the plaintiff's failure to prove that his injuries were caused by its negligence; the Atlas Company's appeal is based upon its assertion that the contract did not cover the plaintiff's recovery. The facts were as follows: The railroad had built a spur track from its main line upon the Atlas Company's land, the end of which ran between two buildings of that company. The accident happened in January; and there was evidence that "ice, snow and refuse" had accumulated upon the track which the railroad alleged might have caused the derailment of a car that caused the plaintiff's injuries, as will appear. An engine of the railroad was pushing an empty boxcar from one of its working tracks along the spur; and Ruddy, the plaintiff, who was the brakeman in this movement, was standing on a ladder at the right hand or northeast end of the car as it moved along the spur. The track curved slightly to the left, or west, a little before it came between the two buildings,

and this prevented any view of Ruddy from either side of the engine at the time of the accident. While the car was moving along the spur at a speed of between two and five miles an hour, its forward truck ran off the rails to the right, or east; and, as the engine pushed it along, it continued to go forward over the ground. The derailment took place fifteen and one-half feet before the car came opposite to the southern corner of the building on the right or east side of the track. The distance between the right or east rail of the track and that corner of the building at that point was 4.75 feet, and the right wheels of the truck had then moved almost exactly a foot away from the right or east track. The overhang of the car beyond the right, or east, wheels of the truck was 3.02, so that, when the car's north end was opposite the southwest corner of the building, and the clearance between the car and the wall was only three-quarters of a foot, or nine inches, instead of one foot and nine inches, as it would have been if the truck had not been derailed. Ruddy was knocked off the ladder somewhere between the corner and twelve feet further north, where he was found on the ground very badly injured.

The Judge charged the jury generally that plaintiff had the burden of establishing the railroad's negligence, but he did not specify any particular ground of negligence, except that they might base a verdict for the plaintiff upon the mere fact that the front truck had been derailed as it passed over the curve. To that the railroad objected and it is the chief, and indeed the only, question that we need consider upon the railroad's appeal. It turns upon the doctrine that has come down to us in the regrettable phrase—*res ipsa loquitur*. As an original question we should have found much difficulty in holding that from the bare fact of the derailment an inference might be drawn that the railroad had been negligent in the construction, supervision and repair of the boxcar.

However, it is established for us that the jury might so infer; for the Supreme Court so decided in *Jesionowski v. Boston & Maine Railroad Co.*, 329 U. S. 452. That also chanced to be an action arising from the derailment of a railway car, and the Court reinstated a verdict for the plaintiff after a reversal by the Court of Appeals which had held that the derailment would not alone support the verdict. The Court said (pp. 457, 458) that the question was "whether the circumstances were such as justify a finding that this derailment was a result of the defendant's negligence. We hold that they were. Derailments are extraordinary, not usual, happenings. When they do occur, a jury may fairly find that they occurred as a result of negligence." An even more extreme application of the same doctrine is *Johnson v. United States*, 333 U. S. 46.

We do not understand that the railroad disputes that it would have been proper to resort to this doctrine, if it had had control over the track where the truck was derailed. It says, however, that it did not have control, because the track ran upon land belonging to the Atlas Company, which that company had agreed to keep "clear of ice, snow and refuse for a distance of 6 feet outside the rails of said track." Since, therefore, the derailment might have been caused by such an accumulation upon the track, it was wrong to apply the doctrine; for it did not follow that the truck would have left the rails, if the Atlas Company had performed its promise. The plaintiff answers that the railroad had reserved the right to discontinue the service, if the Atlas Company should fail to keep the track clear, and that this kept the track within its control. We agree. It is true that, as between the Atlas Company and the railroad, it was the Company's duty to keep the track clear; but that did not relieve the railroad of its duty towards its employees; and it had the means at hand to discharge that duty. We should

be disposed to hold that, even without the reserved privilege of discontinuing service on the spur, the railroad would have had an implied right of entry upon the right of way; but it is enough that the reserved right to discontinue the service upon any default by the Atlas Company was an adequate sanction and continued the responsibility of the railroad attendant upon its control over the *locus in quo*. Moreover, the jury expressly found in the "third-party claim" that the derailment had not been caused by "ice, snow and refuse" on the track; and if that finding should apply equally to the main action, it would make irrelevant the question whether the railroad had that control over the track which is a condition upon the doctrine of *res ipsa loquitur;* for it clearly had complete control over the boxcar. We should hesitate a long time to reverse the judgment on the assumption that the jury had not made the same finding on the two claims on the same issue; and there is no ground whatsoever for supposing that in fact they did not. However, for the reasons we have stated we can leave the question open whether the plaintiff might resort to this special finding.

The remaining question is whether the contract of indemnity of the Atlas Company covered Ruddy's judgment. The Company's promise was in these words: The Company shall indemnify the railroad "for and from any and all liability * * * arising in whole or in part by reason of or in any way resulting from the presence or maintenance of structures or obstructions * * * encroaching upon the aforesaid standard clearances." The phrase, "aforesaid standard clearances," refers back to the Third Article of the agreement which, so far as relevant, read as follows: The Atlas Company "except as to the clearances, if any, less than standard shown upon" an attached map, "shall not allow any temporary or permanent obstruction or structure to be constructed or

maintained within the space of 6 feet outside the nearest rail of any straight portion of said track, being the standard clearance for structures of the Railroad Company." Where the accident happened, the proper "clearance" was eight inches more than six feet, owing to the curve in the track that we have mentioned. As has already appeared, the wall of the building was not six feet away from the east wall at its southwest corner, but 4.75 feet, and at a point 20 feet north of that corner it was 4.50 feet away; and the judge held that, as Ruddy had therefore been knocked off by an invasion of the "standard clearance," the railroad was liable.

The first question is whether the contract covered liabilities for all injuries to whose occurrence an encroaching "structure" in fact contributed; or whether it excluded those to whose occurrence that "structure" would equally have contributed, if it had not encroached. In other words, did the contract exclude liabilities for injuries that would have happened, though the wall had been the full "standard clearance" away from the east rail? We think that it did. Suppose, for example, that some fellow-servant of Ruddy had negligently pushed him off the ladder and against the wall; certainly the contract would not have covered the railroad's liability, if it appeared that Ruddy would have been as much injured if the wall had been the proper distance away. The Atlas Company was willing to insure "standard clearance" for the railroad but nothing more. It agreed to assume the risk of any accident that might happen because the railroad did not have such clearance; but the railroad continued to carry the risks that any invasion of the space did not increase. As we have said, Ruddy was knocked off the car on the curve less than twelve feet from the corner of the building, and the encroachment upon the stipulated "clearance" was six feet, eight inches, less the distance in fact left between the eastern rail and the wall,

which was substantially two feet. The wheels of the truck, when the car stopped—66 feet from the corner—were about one foot eight inches to the east of the rails; and at that point the distance between the wall and the wheels was a little over three feet—the same distance by which the car overhung the track. The corner of the car must therefore have scraped along the side of the wall; and, as we have said, there was testimony to that effect, as well as the evidence of a bent upright pipe, and a scoring along the side of the wall that had not been there before. It is impossible on this record to know whether the car would have touched the wall at all, had the wall been set back two feet; or where it would have touched it if it touched it at all; or what would have been the distance, if any, between the car and the wall, if it never did touch the wall. Indeed it seems highly probable that, if the building had not encroached, the front truck would have continued to move further to the right, and would have knocked Ruddy off the ladder in substantially the same way. Since the evidence does not permit any inference on this issue, the railroad, which had the burden of proving a breach, failed to do so. The special verdict did not cover this failure. The jury answered "yes" to the second question: i. e., whether the accident arose in any part "from the presence of the storage warehouse encroaching on standard clearance"; and also answered "yes" to the fifth question: i. e., whether the accident was caused solely "by the negligent acts or omissions" of the railroad. But nowhere does it appear whether the warehouse would not have played the same part as it did in producing the accident, if it had not "encroached." The motion of the Atlas Company for a directed verdict at the close of all the evidence should have been granted; but we will not direct a dismissal of the "third-party claim," for it is plain that the vital issue was not tried out. Nevertheless, since it is possible that

the railroad upon a second trial may again fail on the facts, we will not now discuss the question whether the contract should be construed to cover liabilities arising from the railroad's negligence.

Satisfaction of Ruddy's judgment should of course not await the new trial of the "third-party claim."

Judgment affirmed in the action of Ruddy against the railroad.

Judgment reversed and new trial ordered on "third-party claim."

SWAN, Circuit Judge, dissenting in part:

I concur in affirmance of the judgment against the railroad. In my opinion the judgment against the Atlas Tack Corporation should also be affirmed.

Judgment of Court of Appeals.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of June one thousand nine hundred and fifty-five.

Present: Hon. Learned Hand,
Hon. Thomas W. Swan,
Hon. Jerome N. Frank,
Circuit Judges.

ROBERT F. RUDDY,
Plaintiff-Appellee,

v.

NEW YORK CENTRAL R. R. Co.,
Defendant-3rd Party-Plaintiff-Appellant,

ATLAS TACK CORPORATION,
3rd Party-Defendant-Appellant.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in the action of Ruddy against the railroad and reversed and new trial ordered on "third party claim" in accordance with the opinion of this Court; with costs to Atlas Tack Corp.

/s/ A. DANIEL FUSARO,
Clerk.

Statutes Involved.

SEC. 51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter, Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

Private Side Track Agreement.

THIS AGREEMENT, made this 23rd day of January, 1947, between The New York Central Railroad Company (hereinafter called the Railroad Company), party of the first part, and Atlas Tack Corporation (Herkimer Egg Carton Division), of the Village of Fair Haven, County of Bristol, and State of Massachusetts (hereinafter called the Industry), party of the second part.

WITNESSETH:

WHEREAS, the Industry has applied to the Railroad Company for a sidetrack connection with the Railroad Company's line of railroad in the Town of Herkimer, County of Herkimer, and State of New York.

NOW THEREFORE, in consideration of the covenants and agreements herein contained, and the mutual benefits to be derived thereunder, the parties hereto agree that the said sidetrack shall be constructed and maintained subject to the following terms and conditions:

FIRST: The term "track" as used herein includes all track, roadbed, bridges and other supporting structures or appurtenances used directly in connection therewith, shown in red and yellow colors on print No. T-244, dated 1-16-08; rev. 10-9-45, hereto attached and made a part of this agreement. The track shall be constructed and owned, and the cost of constructing and maintaining the same, shall be borne by the parties hereto as follows:

(a) The Industry, shall, without cost to the Railroad Company, provide the necessary right of way for the portion of the track extending beyond the Railroad Company's premises, procure and maintain in effect all grants, licenses, franchises or permits necessary for the construction, maintenance, operation or removal of the

track, in, upon or across any public road, street or other property or reservation which may be traversed or intersected thereby, whether such grants, licenses, franchises or permits maybe issued in the name of either party or otherwise, assume the obligations imposed in or by reason of such grants, licenses, franchises or permits, or hereafter imposed by law or other public authority in respect thereof, including all taxes, assessments, license fees, policing and the erection, maintenance and operation of any crossing gates or other warnings or protection, and indemnify and hold harmless the Railroad Company from any and all cost and expense by reason of such grants, licenses, franchises or permits or such impositions of law or other public authority with respect to construction, maintenance, operation or removal of said track.

(b) Unless otherwise hereinafter provided, the Railroad Company shall, at its own expense, construct, own and maintain that part of the truck from the switch point of connection with the Railroad Company's line of railroad to the clearance point (113 feet) as designated by the letters C-P and indicated in red on said print.

(c) The Industry shall, at its own expense, maintain that part of the track indicated by yellow color on said blueprint and shall own the track material placed therein by the Industry in connection with such maintenance, the existing track material therein being owned by and is to remain the property of the Railroad Company.

(d) The Railroad Company shall perform, or cause to be performed, the work of installing such portion of the track specified in paragraph First (c) hereof as it may be requested by the Industry to install, at a cost to be mutually agreed upon, payable in advance at the option of the Railroad Company. If such cost be not so paid in advance, the Industry shall and will pay to the Rail-

road Company promptly upon rendition of bills for work so performed, or caused to be performed, by the Railroad Company the entire cost thereof. Material and labor furnished in the performance of said work shall remain the property of the Railroad Company until such payment is made, and if such payment shall be in default beyond the period of thirty (30) days after bill is rendered, the Railroad Company in addition to all other remedies may discontinue all operations over and remove said track.

(e) The Industry may at its own expense, construct over or under said track, hoppers, pits, other loading or unloading devices, and pipe lines or power wires in connection therewith, and when constructed they shall come under the provisions of this agreement, and all the terms and conditions hereof applying to the track shall apply with equal force to said hoppers, pits, other loading or unloading devices, or to said pipe lines or power wires.

(f) The Industry shall submit to the Railroad Company detail plans of hoppers, pits, other loading or unloading devices, or pipe lines or power wires in connection therewith, and the construction thereof shall not be commenced until said plans have been considered by the Railroad Company and any changes suggested by it incorporated therein.

(g) The Industry shall, at its own expense, keep that part of said track beyond the clearance point clear of ice, snow and refuse for a distance of 6 feet outside the rails of said track.

(h) If the Industry fails to maintain in safe condition, in the judgment of the duly authorized representative of the Railroad Company, the part of the track which is required to maintain, the Railroad Company may disconnect the track or refuse to operate over the same when not in such condition.

SECOND: It is further understood that no Casinghead gasoline, refinery gasoline, naphtha or other inflammable liquid with a flash point below 30° F. will be handled on said track.

THIRD: The Industry shall keep said track clear of obstructions; and, except as to the clearances, if any, less than standard shown upon said print, shall not allow any temporary or permanent obstruction or structure to be constructed or maintained within the space of 6 feet outside the nearest rail of any straight portion of said track, being the standard clearance for structures of the Railroad Company nor within such additional space outside the nearest rail of any curved portion of the said track as the standard requirements of the Railroad Company may, from time to time, prescribe for curves of like degree, nor allow any fixed obstruction to be constructed or maintained within the space of 22 feet, or any wire or cable line, or movable obstruction to be strung, placed or to remain within the space of 27 feet above the top of the rail of said track, which aforementioned clearances being the standard clearances of the Railroad Company shall govern the location of the obstructions or structures herein mentioned, except when the clearance established by law is more than the aforesaid standard clearances in which event the clearance established by law shall govern.

(a) All clearances less than standard shown on said print shall be protected by standard warning guards or signs, together with necessary lighting, placed in such manner and at such locations as shall be required by law or by the duly authorized representative of the Railroad Company. The expense of installing and maintaining such guards or signs and lights shall be borne by the Industry. If the structures or obstructions at said points are changed or removed, the clearance at said points shall then be made not less than standard.

(b) The Industry shall assume and indemnify and hold harmless the Railroad Company for and from any and all liability, loss and expense (including Workmen's Compensation), resulting from loss of life or injury to persons or damage to property (including employees of either of the parties hereto), arising in whole or in part by reason of or in any way resulting from the presence or maintenance of structures or obstructions, whether shown on said print or otherwise, encroaching upon the aforesaid standard clearances or from the presence of wire or cable lines over or adjacent to said track other than structures or obstructions, wire or cable lines belonging to the Railroad Company or its licensees.

FOURTH: The Railroad Company may use the part of said track on its premises and may connect such part with other tracks, and after obtaining the specific written consent of the Industry, may use the part of said track on the premises of the Industry and may connect the same with other tracks, for the operation of its railroad or the use of third parties, provided such use or connection shall not interfere unreasonably with the use of the track, which is the subject of this agreement, for the business of the Industry. In the event of such use or connection to serve other patrons of the Railroad Company, or as a connection with other tracks owned or used by the Railroad Company, there shall be a reduction in the Industry's expense of maintenance and an adjustment of its original outlay, as to the part of said track so used, to be determined by the character and extent of such use.

The Industry agrees not to extend such part of said track as may be on premises owned, controlled or occupied by the Industry or to connect it with any other track, or permit the use thereof by anyone not a party hereto without first obtaining the written consent of the Railroad

Company. In the event of the use thereof by anyone not a party hereto, with such written consent but without entering into a written agreement with the Railroad Company, the Industry shall be responsible for the entire maintenance of such extensions thereto or connection therewith, and shall indemnify the Railroad Company against all liability for loss of life or injury to persons or damage to property by reason of or resulting from such use by others as if the Industry were the sole user.

FIFTH: The Industry assumes all responsibility for and shall indemnify and hold harmless the Railroad Company from and against loss or damage to property of the Industry or to property upon the premises of the Industry or upon said track regardless of the Railroad Company's negligence, arising from fire caused by locomotives operated by the Railroad Company for the purpose of serving said Industry, except to the premises of the Railroad Company and the rolling stock belonging to the Railroad Company or to third parties and to shipments then in the common carrier custody of the Railroad Company.

Except as herein otherwise specifically provided, in respect of all loss or damage to property, other than by fire caused as aforesaid, or in respect of injury to or death of persons caused by or in connection with the construction, operation, maintenance, use, presence or removal of said track, (a) the Railroad Company shall assume responsibility for and hold the Industry harmless from all losses (including Workmen's Compensation), damages, claims and judgments arising from or growing out of the sole actionable acts or omissions of the Railroad Company, its agents or employees; (b) the Industry shall assume the responsibility for and save the Railroad Company harmless from all losses (including Workmen's Compensation), damages, claims and judgments arising

from or growing out of the sole actionable acts or omissions of the Industry, its agents or employees; and (c) the parties hereto shall equally bear all losses (including Workmen's Compensation), damages, claims and judgments arising from or growing out of the joint or concurring actionable acts or omissions of both parties hereto, their respective agents or employees.

SIXTH: If at any time or times hereafter the Railroad Company makes any changes in the location or elevation of its line of railroad at the point of connection with said track, the Industry shall, at its own expense, make such changes in the portion of the track to be constructed and maintained by it as may be necessary to accommodate the changes to be made by the Railroad Company.

SEVENTH: This agreement shall terminate thirty (30) days after written notice by either party to the other to that effect, except that whatever liability may have accrued to either party as against the other, prior to the date of termination hereof, shall continue to remain in force. Such notice on the part of the Railroad Company may be given, at its option, by posting it upon or near said track, and this agreement in such cases shall terminate thirty (30) days after such posting. Within thirty (30) days after the termination as aforesaid of this agreement, either party may remove from the premises of the other all property belonging to it under this agreement and all property belonging to it not so removed from the premises of the other within that time shall belong to the party upon whose premises the property remains; provided that the Railroad Company may at its option buy the track material belonging to the Industry in that portion of the said track located upon its right-of-way or property beyond the clearance point by paying to the Industry, within thirty (30) days

after the termination as aforesaid of this agreement, the then fair value of such track material.

EIGHTH: The provisions hereof shall apply to and govern all changes in grade or locations which may be made in said track and all extensions or additions thereto.

NINTH: This agreement shall inure to the benefit of and be binding upon the heirs, personal representatives, successors and assigns of the parties hereto, except that the Industry shall not, assign this contract or any rights hereunder without first obtaining consent of the Railroad Company.

IN WITNESS WHEREOF, the parties hereto have duly executed this agreement the day and year first above written.

THE NEW YORK CENTRAL RAILROAD COMPANY

WAH
C.A.R.

N. A. DAWSON (L. S.)
General Manager.

ATLAS TACK CORPORATION (Herkimer Egg Carton Division):

SHERMAN H. BOWLES (L. S.)
Pres.

Witness:
FRANK J. W. ANGELO

Approved as to Form:
F. L. WHEELER
F S

Approved as to Plan:
J. H. KELLY
Engr. Maint. of Way

3/14

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IN THE

Supreme Court of the United States

October Term, 1955.

No. 368.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

ROBERT F. RUDDY and ATLAS TACK CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for Respondent, Robert F. Ruddy in Opposition.

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THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1955

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IN THE

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OCTOBER TERM, 1955.

No. 368.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

ROBERT F. RUDDY and ATLAS TACK CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT ROBERT F. RUDDY IN OPPOSITION.

Opinions Below.

The opinion of the District Court is reported at 124 Fed. Supp. 470. The opinion of the Court of Appeals for the Second Circuit, which was unanimous with respect to affirmance of judgment in favor of respondent Robert F. Ruddy, is reported at 224 F. 2d 96.

Jurisdiction.

The jurisdictional requirements are adequately set forth in the petition.

Question Presented.

The term "private sidetrack" used in petitioner's question is misleading. It immediately creates an impression of control outside of the railroad, which did not exist in this case, as the evidence was that although the track was located on the premises of the industry, it was actually owned, installed and mostly maintained by the railroad and whatever maintenance was left to the industry was under the railroad's supervision and control. Therefore, we do not have presented here a clear-cut question of whether or not *res ipsa loquitur* applies to derailments on private sidetracks as a class but merely a question of whether or not on the facts of this particular case it was error for the Trial Court to include the doctrine in its charge.

Statutes Involved.

The pertinent provisions of the Federal Employers' Liability Act, 45 U. S. C. 51-60, are set forth in the petition at page 11a.

Statement of the Case.

Plaintiff-respondent Robert F. Ruddy was riding the side of a boxcar which was being pushed on a siding which ran between two buildings of an industry when the boxcar derailed causing plaintiff to be caught between the car and one of the buildings (218a, 255a, 296a, 298a).* Although the tracks were on the premises of the industry according to paragraph 1-c of the sidetrack agreement set forth in the petition at page 13a, the railroad owned and continued to own the tracks existing at the time of the

* References in parentheses in this paragraph are to pages in the appendix of the railroad company in the Court of Appeals.

agreement, and the track was the same on the day of the accident as at the making of the agreement (37a, 64a). By paragraph 1-d the railroad company was to install any needed tracks; by 1-f it retained the right to control the construction of structures adjacent to the tracks; and by 1-h it retained the right to disconnect or refuse to operate on the tracks if not maintained in safe condition. Also the section crews of the railroad gauged the track and checked the ties following the agreement (115a, 235a).

Although rules and customs required that the movement be halted if plaintiff should be out of view of the engineer or of the other brakeman (39a, 78a),** because of a curve in the track, plaintiff went out of view just prior to the derailment but the movement continued for at least 82 feet after the derailment and after plaintiff had disappeared from view (40a, 46a, 58a, 76a, 79a, 101a, 63a, 27a), and after plaintiff was pinned, the move was not halted until the 50-foot boxcar had passed completely beyond him (56a, 38a, 46a, 60a). The move was being made slowly and could have been stopped instantly if plaintiff had been in sight. The fireman signalled the engineer to continue the movement after the derailment relying on a signal taken from an employee of the industry which was misunderstood (89a, 93a).

The main body of the charge to the jury concerned negligence generally under the Federal Employers' Liability Act and there was also a charge of *res ipsa loquitur* with respect to the derailment. The jury brought in a general verdict for plaintiff and in answer to a special question in the third-party action which was tried in conjunction with plaintiff's case, the jury found that the derailment was not caused by ice, snow or refuse on the rails. Judgment for plaintiff was entered forthwith and

** References in parentheses in this paragraph are to pages of the appendix of the Atlas Tack Corporation in the Court of Appeals.

the Court of Appeals for the Second Circuit unanimously affirmed the judgment for plaintiff.

Argument.

The issue in the present case is a narrow one. It involves a determination of whether or not the terms of the particular contract with the industry and the particular facts of this case as to actual supervision and control of the tracks warrant the use of the doctrine of *res ipsa loquitur*. The case merely calls for the application to a set of facts of a well-established doctrine, the principles of which have been clearly set forth by this Court in *Sweeney v. Erving*, 228 U. S. 233, and the application of which to cases under the Federal Employers' Liability Act on a surprisingly similar set of facts has recently been described at length in *Jesionowski v. Boston & M. R. R.*, 329 U. S. 452. A review of the present case would contribute nothing to clarify the principles of the doctrine nor its application to any class of cases but would merely be of importance to the parties involved. This was not a case which could only go to the jury by using the *res ipsa loquitur* doctrine. There was considerable evidence of active negligence on the part of other members of plaintiff's crew in continuing the movement after plaintiff was out of sight and in the taking of a mistaken signal by the fireman. If the move had stopped or plaintiff been kept in sight so that his danger could have been perceived, the accident would have been avoided. The inference created by the derailment was therefore merely additional evidence of negligence for consideration by the jury.

That the track on which this accident happened was a private sidetrack in name only is shown by the fact that the railroad owned and installed the tracks and actually performed maintenance work in gauging the rails and checking the ties. True, the agreement called for the

industry to keep the track clear of ice, snow and refuse, but as far as its own employees were concerned, the railroad thereby made the industry its agent for the clearance of ice and snow and kept control by retaining the right to disconnect service if the track was not kept clear. On the basis of these facts the railroad had such control of all of the circumstances surrounding the derailment as to warrant the application of the doctrine of *res ipsa loquitur* and the inference it created. The Courts below therefore acted correctly.

Even in the absence of such clearly defined control described above, the charge as to *res ipsa loquitur* was proper under *Jesionowski v. Boston & M. R. R.*, 329 U. S. 452. On the facts before them the jury could have found that there was exclusive control, or, as in the *Jesionowski* case, found that the one factor over which there was not exclusive control was not a cause of the accident. The only possible non-exclusively controlled factor in this case was the clearing of ice and snow from the tracks and actually the jury in its answer to a special question in connection with the third-party claim found that ice and snow did not cause the derailment. Everything else then being clearly under the control of the railroad, the jury was entitled to consider the inference of negligence created by the derailment along with all of the other evidence of active negligence on the part of other members of the crew.

That the decision of the Court of Appeals is entirely in harmony with *Sweeney v. Erving*, 228 U. S. 233; *Jesionowski v. Boston & M. R. R.*, 329 U. S. 452; and *Johnson v. United States*, 333 U. S. 46, is not seriously questioned. *Res ipsa loquitur* was not mentioned in *Atlantic Coast Line R. Co. v. Temple*, 285 U. S. 143 (1931), and the facts therein had little comparison with the facts in the instant case, particularly because there was overwhelming evi-

dence of sabotage in that case. The opinion in that case merely recites a detailed set of facts and states that on examination of the entire record, there is no basis for a finding of negligence. Certainly there is no principle established by that decision which is in danger of being upset by the opinion of the Court below or is in conflict with it. In any event, the *Jesionowski* decision supersedes any conclusions concerning *res ipsa loquitur* and derailments which might be gathered from the *Atlantic Coast Line* decision.

The question in this case is important to other railroads and to other industries only insofar as their sidetrack agreements are duplicates of the agreement herein and the facts and circumstances of control over their tracks are identical. It is submitted that this limits the importance of this case solely to the parties involved. If the case involved a private sidetrack where control was actually in the industry and there was no control by the railroad, a claim that the decision would be important to other railroads and industries would sound more reasonable, but, even in that event, it is submitted that the question would not be of sufficient importance to warrant review by this Court. To enumerate or classify by the manner and place of the happening of the accident the types of cases in which *res ipsa loquitur* is applicable is impossible. Needless to say, this Court cannot possibly rule on every such type of case. If this question which is confined solely to derailments and sidetracks is important enough for a review by this Court, then the Court will also be asked to review cases with questions involving derailments and public crossings, collisions and sidetracks, etc. It is enough that principles have already been established for the guidance of lower Courts in cases of this type in *Sweeney v. Erving*, 228 U. S. 233, and in *Jesionowski v. Boston & M. R. R.*, 329 U. S. 452, and there is no important question of federal law calling for a special ruling in this case.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: September 26, 1955.

Respectfully submitted,

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